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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ROSALINDA GARZA-WIESAND,

Cross-complainant and
Appellant,

v.

ELBA P. GARZA et al.,

Cross-defendants and
Respondents.

B271355 c/w B276694

(Los Angeles County
Super. Ct. No. BC561140)

APPEALS from orders of the Superior Court of Los Angeles County, Gregory W. Alarcon and Teresa A. Beaudet, Judges.
Reversed and remanded with directions.

Rosario Perry, for Cross-complainant and Appellant.

Law Offices of Stewart Levin and Stewart Levin for Cross-defendant and Respondent Edward L. Perez.

No appearance for Cross-defendants and Respondents Elba P. Garza and Hector A. Garza, Jr.

Cross-complainant and appellant Rosalinda Garza-Wiesand (Rosalinda) appeals an order striking her cross-complaint pursuant to a special motion to strike (Code Civ. Proc., § 425.16)¹ brought by cross-defendants and respondents Edward Perez (Edward), Elba P. Garza (Elba), and Hector A. Garza, Jr. (Hector, Jr.).²

Rosalinda also appeals a subsequent order awarding \$19,640 in attorney fees and costs to Edward pursuant to section 425.16, commonly known as the anti-SLAPP statute. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57.)

We reverse the order granting the special motion to strike because Rosalinda's cross-complaint did not arise out of protected activity and therefore did not implicate the anti-SLAPP statute. As a consequence, we also reverse the order awarding attorney fees and costs to Edward as the prevailing party on the anti-SLAPP motion.

¹ All unspecified statutory references are to the Code of Civil Procedure.

² For clarity and consistency, we refer to the various individuals involved in this matter by their first names. No disrespect is intended. (*In re Marriage of Olsen* (1994) 24 Cal.App.4th 1702, 1704, fn. 1.)

FACTUAL AND PROCEDURAL BACKGROUND

1. The parties.

Elba and Hector Garza, Sr. (Hector, Sr.) were married for many years. He passed away at age 80 in 2011. Elba, his surviving spouse, is elderly and incapacitated, and a guardian ad litem has been appointed for her.

Rosalinda is the daughter of Elba and Hector, Sr. Rosalinda was married to Theodore Wiesand (Ted), who now is deceased.

Hector, Jr. is Rosalinda's older brother. Edward is Rosalinda's nephew.

2. Elba's complaint against Rosalinda, alleging financial elder abuse and other theories.

On October 17, 2014, Elba filed suit against Rosalinda and Ted, relating to issues of ownership of the real property located at 236 and 238 South Avenue 55 in Los Angeles (hereafter, the subject properties). The operative first amended complaint alleged, inter alia:

Elba and Hector, Sr. purchased the subject properties in 2003 as trustees of their trust, the Hector and Elba Garza 2003 Trust. In January 2010, Rosalinda orchestrated the creation of Heritage Prop. Mgmt. LLC (Heritage) and persuaded her parents to convey the subject properties to Heritage. In July 2010, Hector, Sr., in failing health and fearful that Rosalinda would usurp his rights, transferred his 50 percent share in the subject properties to a trust, the Hector Garza Living Trust, to ensure that his grandson Edward would receive his interest in the properties. Rosalinda and Ted became enraged when they learned of the transfer, and Edward, at the request of Hector, Sr., transferred his interest in the properties back to Heritage.

Thereafter, Rosalinda and Ted sought to unduly influence Elba and coerced her to execute deeds transferring ownership of the properties to Ted. They falsely informed Elba that the properties were in danger of being seized due to nonpayment of taxes. They placed documents in front of Elba that ostensibly would allow them to manage the properties, evict tenants, repair the premises and collect rent, which would provide Elba with \$9,000 per month in income. In reality, the documents that Elba was compelled to sign were grant deeds purporting to transfer the properties to Ted.³

Based on the foregoing, Elba asserted claims against Rosalinda and Ted for quiet title, financial elder abuse, fraud, an accounting, money had and received, and declaratory relief.

3. *Rosalinda's cross-complaint.*

On October 7, 2015, Rosalinda filed a cross-complaint against Elba, Hector, Jr., and Edward. The cross-complaint, which was the subject of the special motion to strike, pled in relevant part as follows:

Rosalinda's parents "wanted, desired, and intended for Rosalinda's late husband [Ted] to own, maintain and protect the subject properties." Accordingly, Hector, Sr. and Elba transferred the properties to Ted through a written agreement, which was evidenced by deeds dated October 19, 2010, and a promissory note attached as Exhibit A to the cross-complaint. Rosalinda and Ted performed all duties and obligations under the agreement, except those obligations that were excused. When Ted passed

³ Elba's complaint also referred to another pending lawsuit (L.A. Super. Ct. No. BC465205) that Edward filed against Ted to quiet Edward's title to the property, pursuant to the deeds executed by Hector, Sr.

away, Rosalinda succeeded to his interest in the subject properties.

Based on the above, the cross-complaint pled four causes of action.

The first cause of action, against Elba, Hector, Jr. and Edward, was for quiet title. Rosalinda alleged she is “the true owner in fee simple of the subject properties,” and she sought to quiet her title as of October 19, 2010, free and clear of any claimed interest of the cross-defendants, except for Elba’s interest as reflected in the promissory note.

The second cause of action sought declaratory relief as against Elba, Hector, Jr., and Edward. Rosalinda alleged she owns the subject properties free and clear of any claims by them (except for Elba’s interest as reflected in the promissory note), and she requested a judicial determination of her rights with respect to the subject properties.

The third cause of action, which was directed solely against Elba, was for breach of contract. Rosalinda pled that Elba breached the agreement by “not defending the title she transferred pursuant to the agreement and by her granting other and inconsistent rights in the subject properties after she had divested herself of title pursuant to the agreement;” and that as a result of Elba’s breach, Ted and Rosalinda incurred damages as well as attorney fees and expenses.

The fourth cause of action, which named Elba, Hector, Jr., and Edward, was for intentional interference with prospective business advantage. Rosalinda alleged that the cross-defendants acted with the intent to interfere with her business interests, and wanted “to prevent [her] from obtaining and exercising her rights and entitlements as hereinabove alleged.”

4. *The cross-defendants' special motion to strike.*

On November 9, 2015, Edward filed a special motion to strike the cross-complaint in its entirety. Elba and Hector, Jr. filed joinders in Edward's motion. The moving papers contended the cross-complaint was subject to a special motion to strike because it targeted the cross-defendants for their involvement in filing related litigation.

The special motion to strike relied specifically on paragraph 18 of Rosalinda's cross-complaint, which was incorporated by reference into each and every cause of action and which alleged as follows: "18. Rosalinda alleges through no fault of her own, *cross-defendants caused the problems of ownership, maintenance, payments, and profit* which have occurred since related litigations commenced shortly after Elba's husband passed away. Exhibits 'B' and 'C,' attached hereto and incorporated herein by this reference set forth, are just two items of evidence showing that neither this nor any prior litigation should have been brought." Citing this allegation, the special motion to strike argued the cross-complaint had targeted the cross-defendants for their involvement in prior litigation and thus was subject to anti-SLAPP scrutiny.

The special motion to strike further argued that because the cross-complaint was based on cross-defendants' protected activity, Rosalinda had the burden to demonstrate the probability of prevailing on her claims and that she was incapable of doing so.

5. *Rosalinda's opposition to the special motion to strike.*

On January 20, 2016, Rosalinda filed opposition to Edward's anti-SLAPP motion, in which Elba and Hector, Jr. had joined. Rosalinda contended her claims did not arise out of any

protected litigation activity by the cross-defendants, and that she was suing for their interference “with [her] contract and [her] property rights.”

6. *Trial court’s ruling granting the special motion to strike the cross-complaint.*

On February 2, 2016, the trial court granted the special motion to strike the cross-complaint in its entirety, stating: “Where a gravamen of a cross-complaint is based on a party’s filing of litigation, the cross-complaint is subject to an anti-SLAPP motion.” The trial court “determine[d] that the SLAPP statute applies, and that the opposing evidence does not show any merit of the alleged causes of action.”

7. *The order awarding attorney fees and costs to Edward.*

On February 10, 2016, Edward filed a motion seeking attorney fees and costs, as the prevailing party on the special motion to strike, in the sum of \$19,640.

On June 8, 2016, the trial court granted Edward’s motion and awarded him attorney fees and costs as requested.

8. *The appeals.*

Rosalinda filed timely notices of appeal from the February 2, 2016 order granting the special motion to strike, and the June 8, 2016 order awarding attorney fees and costs to Edward.⁴ The two appeals were consolidated.

⁴ The February 2, 2016 order granting the special motion to strike is appealable pursuant to section 425.16, subdivision (i) and section 904.1, subdivision (a)(13). The June 8, 2016 order directing the payment of attorney fees and costs to Edward is appealable under the collateral order doctrine. (*City of Colton v. Singletary* (2012) 206 Cal.App.4th 751, 781-782.)

CONTENTIONS

Rosalinda's contentions may be summarized as follows: the trial court erred in granting the special motion to strike because her cross-complaint did not arise from protected activity by the cross-defendants; even assuming her cross-complaint did arise from their protected activity, she established a probability of prevailing on the merits; and the award of attorney fees to Edward, based upon the erroneous grant of the anti-SLAPP motion, must be reversed.

DISCUSSION

1. *General principles and standard of appellate review.*

"A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).)

"The anti-SLAPP statute does not insulate defendants from *any* liability for claims arising from the protected rights of petition or speech. It only provides a procedure for weeding out, at an early stage, *meritless* claims arising from protected activity. Resolution of an anti-SLAPP motion involves two steps. First, the defendant must establish that the challenged claim arises from activity protected by section 425.16. [Citation.] If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success. We have described this second step as a 'summary-judgment-like procedure.' [Citation.] The court does not weigh evidence or resolve conflicting factual claims. Its

inquiry is limited to whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment. It accepts the plaintiff's evidence as true, and evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law. [Citation.] '[C]laims with the requisite minimal merit may proceed.' ” (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384–385, fn. omitted (*Baral*).)

We review an order granting or denying an anti-SLAPP motion under the de novo standard and, in so doing, conduct the same two-step process to determine whether as a matter of law the defendant met its initial burden of showing the challenged claim arose out of the defendant's protected activity and, if so, whether the plaintiff met its burden of showing a probability of success. (*Optional Capital, Inc. v. Akin Gump Strauss, Hauer & Feld LLP* (2017) 18 Cal.App.5th 95, 112–113.)

2. *Baral*.

In *Baral*, the California Supreme Court addressed the following question: “How does the special motion to strike operate against a so-called ‘mixed cause of action’ that combines allegations of activity protected by the statute with allegations of unprotected activity?” (*Baral, supra*, 1 Cal.5th at p. 381.) The Supreme Court disapproved authority holding that an anti-SLAPP motion lies only to strike an entire cause of action as pled in a complaint, and held that an anti-SLAPP motion may be used to strike particular allegations within a cause of action. (*Id.* at pp. 382, 392–393.)

The Supreme Court rejected the idea that anti-SLAPP motions are restricted to indivisible causes of action as determined by the primary rights theory. (*Baral, supra*,

1 Cal.5th at p. 394.) The court reasoned that section 425.16, subdivision (b)(1) expresses the Legislature’s “desire to require plaintiffs to show a probability of prevailing on ‘the claim’ arising from protected activity, not another claim that is based on activity that is beyond the scope of the anti-SLAPP statute but that happens to be included in the same count.” (*Baral, supra*, 1 Cal.5th at p. 393.) The Legislature’s choice of the term “motion to strike” reflected the understanding that “an anti-SLAPP motion, like a conventional motion to strike, may be used to attack parts of a count as pleaded.” (*Ibid.*) *Baral* concluded: “Thus, in cases involving allegations of both protected and unprotected activity, the plaintiff is required to establish a probability of prevailing on any claim for relief based on allegations of protected activity. Unless the plaintiff can do so, the claim and its corresponding allegations must be stricken. Neither the form of the complaint nor the primary right at stake is determinative.” (*Id.* at p. 395.)

Baral addressed the concern that its holding would allow defendants to exploit the anti-SLAPP statute by targeting “fragmentary allegations, no matter how insignificant.” (*Baral, supra*, 1 Cal.5th at p. 394.) The court declared the concern “misplaced,” explaining: “*Assertions that are ‘merely incidental’ or ‘collateral’ are not subject to section 425.16.* [Citations.] Allegations of protected activity *that merely provide context, without supporting a claim for recovery*, cannot be stricken under the anti-SLAPP statute.” (*Ibid.*, italics added.) Rather, “[t]he targeted claim must amount to a ‘cause of action’ in the sense that it is alleged to justify a remedy” and only “allegations of protected activity that are asserted as grounds for relief” are properly subject to a special motion to strike. (*Id.* at p. 395,

italics omitted; accord, *Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1060 (*Park*) [a claim may be stricken only if the speech or petitioning activity *itself* is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted].)

Baral provided the following guidance for future cases: “At the first step, the moving defendant bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them. When relief is sought based on allegations of both protected and unprotected activity, the unprotected activity is disregarded at this stage. If the court determines that relief is sought based on allegations arising from activity protected by the statute, the second step is reached. There, the burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated. The court, without resolving evidentiary conflicts, must determine whether the plaintiff’s showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment. If not, the claim is stricken. Allegations of protected activity supporting the stricken claim are eliminated from the complaint, unless they also support a distinct claim on which the plaintiff has shown a probability of prevailing.” (*Baral, supra*, 1 Cal.5th at p. 396.)

Guided by the above, we examine whether the cross-defendants met their initial burden on the special motion to strike to establish that Rosalinda’s cross-complaint, or any portion thereof, arose from their protected activity.

3. *The trial court erred in granting the special motion to strike because the cross-complaint did not arise from protected activity by the cross-defendants.*

Edward is the only respondent who has filed a brief in this matter. As he did in the court below, Edward relies principally on the allegations set forth in paragraph 18 of Rosalinda’s cross-complaint to argue that the cross-complaint arose out of protected activity—namely, filing related litigation. As explained below, notwithstanding the inclusion of paragraph 18 in the cross-complaint, none of Rosalinda’s causes of action arose from cross-defendants’ protected activity. We discuss Rosalinda’s causes of action seriatim.

a. *The first cause of action for quiet title.*

In the first cause of action of the cross-complaint, Rosalinda sought to quiet her title to the subject properties.

The essential elements of a claim for quiet title are that “the plaintiff is the owner in fee simple of the described property, that each defendant claims some interest in the property, that each claim is wrongful and that no defendant has any interest in the property.” (*Lucas v. Sweet* (1956) 47 Cal.2d 20, 22.) Thus, the existence of prior litigation is *not* an element of Rosalinda’s cause of action for quiet title.

Merely because paragraph 18 of the cross-complaint made reference to “prior litigation” does not mean the quiet title claim arose from protected activity. The allegation of prior litigation merely provided context, without serving as the basis of the quiet title claim. As *Baral* explained, “[a]ssertions that are ‘merely incidental’ or ‘collateral’ are not subject to section 425.16. [Citations.]” (*Baral, supra*, 1 Cal.5th at p. 394.)

Accordingly, the quiet title claim did not arise from protected activity by the cross-defendants and therefore should not have been stricken.

b. *The second cause of action for declaratory relief.*

In the second cause of action of the cross-complaint, Rosalinda sought a judicial declaration of her rights with respect to the subject properties.

To qualify for declaratory relief under section 1060, a plaintiff must show that the action “present[s] two essential elements: ‘(1) a proper subject of declaratory relief, and (2) an actual controversy involving justiciable questions relating to the rights or obligations of a party.’” (*Lee v. Silveira* (2016) 6 Cal.App.5th 527, 546.) Thus, the existence of prior litigation is *not* an element of Rosalinda’s cause of action for declaratory relief.

Again, simply because paragraph 18 of the cross-complaint mentioned “prior litigation” does not mean the declaratory relief claim arose from protected litigation activity. The allegations of prior litigation “merely provide[d] context” without serving as the basis of the claim for declaratory relief. (*Baral, supra*, 1 Cal.5th at p. 394.)

Thus, the declaratory relief claim did not arise from protected activity by the cross-defendants and therefore should not have been stricken.

c. *The third cause of action for breach of contract.*

In the third cause of action, Rosalinda alleged that Elba breached the written agreement between Elba and Ted for the transfer of the subject properties, an agreement that was evidenced by the deeds dated October 19, 2010, and the \$500,000 promissory note.

The elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.) Here, Rosalinda alleged that Elba breached the agreement by "not defending the title she transferred pursuant to the agreement and by her granting other and inconsistent rights in the subject properties after she had divested herself of title pursuant to the agreement." Thus, the alleged breach of contract consisted of Elba's disavowal of the agreement into which she had entered. The allegation of "prior litigation" in paragraph 18, at most, "provide[d] context" for the breach of contract claim, without supporting a claim for recovery for breach of contract. (*Baral, supra*, 1 Cal.4th at p. 394.)

Accordingly, the breach of contract claim did not arise from protected activity by Elba and should not have been stricken.

d. *The fourth cause of action for intentional interference with prospective business advantage.*

The fourth cause of action alleged that the cross-defendants acted with the intent to interfere with Rosalinda's business interests, and wanted "to prevent [her] from obtaining and exercising her rights and entitlements as hereinabove alleged."

The elements of the tort of intentional interference with prospective economic advantage (business interference) are " (1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of that relationship; (3) *intentional acts on the part of the defendant designed to disrupt the relationship*; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the

acts of the defendant.’ ” (*Popescu v. Apple Inc.* (2016) 1 Cal.App.5th 39, 63, italics added.) The issue thus arises whether Rosalinda’s cause of action for intentional interference with prospective economic advantage arose from protected activity by the cross-defendants in prior litigation.

We reiterate the allegations of paragraph 18 of the cross-complaint: “18. Rosalinda alleges through no fault of her own, cross-defendants caused the problems of ownership, maintenance, payments, and profit which have occurred since related litigations commenced shortly after Elba’s husband passed away. Exhibits ‘B’ and ‘C’ . . . are just two items of evidence showing that neither this nor any prior litigation should have been brought.”

As Rosalinda argues, paragraph 18 alleges damages arising out of “ownership, maintenance, payments, and profit”—it does not allege damages based upon the filing of prior litigation. The reference to problems that occurred, in the phrase “cross-defendants caused the problems of ownership, maintenance, payments, and profit *which have occurred since related litigations commenced shortly after Elba’s husband passed away*,” simply specifies the time when those alleged problems occurred.

Finally, the last sentence of paragraph 18, alleging that Exhibits B and C “are just two items of evidence showing that neither this nor any prior litigation should have been brought,” is merely incidental and provides context. (*Baral, supra*, 1 Cal.5th at p. 394.) This assertion is *not* the basis of Rosalinda’s claim that cross-defendants interfered with her prospective economic advantage.

For these reasons, the fourth cause of action did not arise from protected activity and should not have been stricken.

e. *Remaining issues not reached.*

Because we conclude the cross-complaint did not arise from the cross-defendants' protected activity, it is unnecessary to address whether the cross-complaint was compulsory in nature, whether Rosalinda established a probability of prevailing on her claims, or any other issues relating to the trial court's grant of the special motion to strike.

4. *The award of attorney fees and costs to Edward must also be reversed.*

Section 425.16, subdivision (c), entitles a prevailing defendant on a special motion to strike to recover his or her attorney fees and costs. Based on the trial court's granting of cross-defendants' special motion to strike, an award of fees was mandated. (*Ibid.*) In view of our reversal of that order, however, the attorney fee award no longer has a legal basis and must necessarily fall as well. (*Gallimore v. State Farm Fire & Casualty Ins. Co.* (2002) 102 Cal.App.4th 1388, 1400–1401.)⁵

⁵ Rosalinda also contends that cross-defendants' special motion to strike, and any opposition to her appeal, are frivolous and sanctionable. The argument lacks merit. The fact the trial court granted cross-defendants' special motion to strike disposes of Rosalinda's contention that their special motion to strike was frivolous. Further, while sanctions may be awarded for "[t]aking a frivolous appeal or appealing solely to cause delay" (Cal. Rules of Court, rule 8.276(a)(1)), Rosalinda cites no authority for the proposition that a *respondent* may be sanctioned for a meritless opposition to an appeal.

DISPOSITION

The February 2, 2016 order granting the special motion to strike is reversed with directions to reinstate Rosalinda's cross-complaint against Edward, Elba and Hector, Jr. The June 8, 2016 order awarding \$19,640 in attorney fees and costs to Edward pursuant to the anti-SLAPP statute is also reversed. Rosalinda shall recover her costs on appeal.

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EDMON, P. J.

We concur:

EGERTON, J.

DHANIDINA, J.